Getting to Proportional

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When the British revised their Civil Procedure Rules ("CPR") to encourage greater proportionality and cost management in discovery, they did so against a backdrop of procedural laws that already incentivized cost containment through a 'loser pays' approach. Using discovery expense as a weapon to achieve a favorable outcome is a potentially-risky proposition, and one that is handicapped from the beginning by the requirement of a detailed discovery budget submission that British courts take seriously.

As the British revised their CPR, critics of the U.S. Federal Rules of Civil Procedure ("FRCP") argued more publically for inclusion of the word "proportional," "proportionate," and/or "proportionality" in our more significant discovery provisions. In response, the authors of the amended FRCP propose the express interjection of 'proportional,' in its many grammatical forms, into the 2015 version of our federal civil discovery rules.

Amended Rule 26(c),[3] if enacted as proposed, will include express recognition, by internal reference to its own subsection (b), of the court's authority to allocate discovery expenses in an effort to ensure that costs are "proportional to the needs of the case." Though courts often use the current Rule to assume that power, the proposed language will silence any remaining opposition. And we need not rely on the court to initiate and perform this analysis, as the parties may find it more efficient to propose their own cost allocation models to the court. In fact, several court-authored ESI protocols are suggesting, and a few are requiring, that parties do just that.

The concept of subjective cost allocation in discovery, though not entirely consistent with the aging American model of 'producing party pays,' is not on its face especially innovative. However, as we watch the ripples spread outward from the little "must" pebble embedded in proposed Rule 26(c), we see litigants starting to understand and react to having to consider real financial consequences of even their earliest strategic decisions. "Must" works within the rest of the rule text to incentivize cooperation, and will continue to inspire litigants to bring creativity and innovation to discovery.

Judicial opinions addressing cost allocation in discovery have used metaphors, multi-prong tests and research memo-like approaches to answering the question: *is it worth it*? There is a bulging and

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[3] Proposed Rule 26(c) reads, in pertinent part, "On motion or on its own, the court *must* limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that. . .(iii) the proposed discovery is outside the scope permitted by Rule 26(b)(1)." Proposed Rule 26(b)(1) permits parties to "obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense *and proportional to the needs of the case*…" (emphasis added).

contracting "discovery fence" in the Eastern District of Pennsylvania,[4] seven factors in the Southern District of New York[5] and Judge Paul Grimm everywhere else.[6] The goal of these efforts is to appropriately assign value to future evidence so that we can answer '*is it worth it*?' in a manner not inconsistent with Truth, Justice and The American Way.

If the parties are similarly positioned with respect to the resources available to them, we can draw a pretty clear line (or put up a row of fencing, if you will) right down the middle of 'Relevant/Responsive/Proportional' and 'Relevant/Responsive/Not Proportional.' On one side the responding party pays, on the other, the requesting party. The litigants and/or court must still assign value to a *quality* (e.g., "the importance of the issues at stake in the action") in order to load the 'proportionality scale' with the appropriate amount of weight on both sides, but no one really needs to figure out how to quantify resource disparity – a quantity that cannot fail to account for the inherent strengths, and not just weaknesses, of being the poorer party.

When there is asymmetry in the litigants' respective abilities to pay discovery expenses, the evaluation of "worth" requires a consideration of facts that have nothing to do with the substance of the litigation. The Rules build in a sort of handicapping system to even the playing field by allowing the decision maker to throw onto the scale the weight (or value) it assigns to the parties' resource disparity. In this respect, and others, the American discovery system seems unnatural to foreign participants. Even our American sensibilities can sometimes be offended as a result of the introduction of unrelated, external considerations onto what should be a thoughtful analysis on the merits of the claims. However, while this may not be the ideal backdrop for the blind administration of justice, we recognize that there is no achievable ideal and so we must do our best to proximate it.

Merit-neutral cost allocation is a relatively-inoffensive way to level the proverbial playing field. (Of course, we refer to the merits of the case and not the merit of any particular discovery demand, as the latter of the two will essentially drive this analysis.) With a litigant's ability to win its case being based in large part on what the evidence shows – or what the party can show it shows – equal access to the relevant information should tee up the litigation to be decided in a manner as close to ideal as we will likely be able to achieve.

For many of us, "equal access to the relevant information" may evoke an image of a large, windowless conference room filled with bankers' boxes and opposing counsel. Modern technology now permits us to indulge a vision of more hospitable environs. A joint litigation repository is one practical manifestation of such a vision, yet despite encouragement from significant litigation venues like the Northern District of California, the District of Colorado and the Southern District of New York, it is a trend that has yet to catch on.

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[4] *See Boeynaems v. LA Fitness Int'l*, 285 F.R.D. 331, 333 (E.D. Pa. 2012).
[5] *See Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309, 322 (S.D.N.Y. 2003).
[6] *See, e.g., Mancia v. Mayflower Textile Servs. Co.,* 253 F.R.D. 354, 357-58 (D. Md. 2008) and the Standing Order of Judge Paul Grimm, revised Jan. 29, 2013, at 1-2.

While there are certainly scary theoretical downsides to sharing a virtual conference room with your adversary, the reality is that when done well, this approach is just as safe, easier and much less expensive. There is also the benefit of a simplified cost allocation calculation. An itemized invoice from one vendor is comparatively easy to split between litigants according to the 'proportionality ratio' either the court or the litigants themselves have set. Even without a court mandate, counsel should consider whether using a joint repository could facilitate better client service.

There are many ways to improve efficiency in discovery (e.g., presumptive limits, creative privilege logs, phased discovery). Current trends in case law and the proposed Rule amendments exemplify the expectation, not the exception, that costs be allocated fairly and proportionate to the value of the matter. As we see the early signs of the phasing out of the 'producing party pays' model, we also expect to see litigants being more innovative and cooperative in their approach to discovery.